No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

BRIEF FOR APPELLEES.

WILLIAM DENMAN,
WM. F. ROSE,
Solicitors for Appellees.

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BRIEF FOR APPELLEES.

Foreword.

This litigation has not been conducted solely by Overton and Martin, as has at all times been urged on appeal by appellants, but nine other minority stockholders of defendant Presidio Mining Company have at all times actively aided in the prosecution of this litigation in their own interests. There is on file in this court the petition of these minority stockholders asking leave to intervene, filed February 9, 1920, regularly argued and submitted to this court, but never decided by it (New Tr. 1491-1511).

APPELLEES' MOTION TO DISMISS APPEAL.

In their motion to dismiss this appeal appellees therein stated:

> "This suit in equity was originally commenced July 26, 1915, a motion to dismiss the original bill was granted, an application for receivership denied, and twenty (20) days allowed by Judge Maurice Dooling, presiding in the absence of Judge Wm. C. Van Fleet, within which plaintiffs below might file an amended bill and renew their application for a receivership. Plaintiffs below filed their amended bill and renewed their application for an injunction and for a receiver. This matter regularly came on before Judge Van Fleet, and also, at the same time, defendants' new motion to dismiss the amended bill, their objections to injunctive relief or appointment of a receiver. The motion to dismiss the amended bill, and for a receivership, were denied by Judge Van Fleet, and an injunction was granted. Subsequently, trial was had on the merits and decision rendered in favor of plaintiffs and against defendants, and the appointment of a receiver ordered. Said receiver, over the objections of defendants, took possession of the property and mine of the Presidio Mining Company, and Section 5, theretofore held by Wm. S. Noyes, which was adjudicated to belong to the Presidio Mining Company, and operated the same. Said receivership commenced about March 1st, 1918, and terminated May 7th, 1921, during all of which said period said receiver conducted the mining operations of the Presidio Mining Company upon Section 8, and also said Section 5 adjoining, all in Presidio County, State of Texas.
>
> That said receiver duly rendered annual reports of his receivership and after judgment of the Circuit Court of Appeals for the Ninth Circuit, filed in the trial court his fourth and

final account. At the hearing on said final account, said defendants below objected to any deductions being made from the property or funds to be returned by the receiver to the corporation. Said receiver returned to the company approximately $638,000.00, after payment of all receivership costs, fees, expenses, taxes and improvements, an increase of approximately $500,000.00 over the amounts of money and securities received by him at the time of the assumption of his receivership. These objections of said defendants below and the answer thereto by plaintiffs, coming on regularly to be heard before the trial court, and being submitted for decision, the court ordered that the said final account of the receiver be approved and the moneys due for compensation to receiver and his counsel, and his expenses, were ordered deducted from the funds in his hands, the residue to be delivered to the Presidio Mining Company, the court reserving its decision as to who ultimately should pay the costs of said receivership, till entry of final decree, when the question of taxation of costs would be determined. No objections were made to the mathematical correctness of the reports filed, nor to the fairness of the fees of the receiver and his counsel, nor to the expenses of the receivership, but their fairness was conceded. From this order, this purported appeal by appellants has been taken."

Appellees' motion to dismiss this appeal is based on six grounds:

1. That it is not an appealable judgment;

2. It is premature; for

3. The question of taxation of costs is within the jurisdiction of the trial court in the first instance;

4. For this court to decide said question would be to anticipate the action of the trial court;

5. That the appellants can suffer no prejudice by dismissal of this appeal, for their rights can be protected on entry of final decree;

6. This court has no jurisdiction over the parties or subject matter at the present time.

Appellants in the trial court in objecting to the allowance of the receiver's account and compensation, conceded the mathematical correctness of the accounts filed (New Tr. 501), and likewise conceded that the amounts paid to the receiver were fair (New Tr. 504). Their position is that no deductions should be made from the amount turned over by the receiver to the corporation, but his compensation and expenses should be taxed against the appellees. In other words, by indirection, an attempt is made to have the trial court thus tax said costs.

The question as to taxation of costs by the opinion and order of the trial court (Tr. 501, 504) was reserved until entry of final decree. We are therefore confronted with the question as to whether or not such an order entered in the trial court is appealable.

Had the challenge been to the fairness of the receiver's compensation, or objections filed as to the correctness of any of the items in the receiver's account, an appeal might lie from the order of the trial court. These two vital elements being removed from the case, we are reduced to the question as

to whether or not this is a taxation of costs, which appellants seek to enforce at this time against appellees, the exercise of which is especially reserved by the trial court until entry of final decree.

The rule as to the appealability of an order such as this in question we believe is fairly stated in *Butler v. Fayerweather,* 91 Fed. 458, at 460:

> "Whenever, in a cause, there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary."

The appeal here is clearly an attempt to obtain a decree of this court coercing the trial court to enter a *certain kind* of a decree taxing the costs of the receivership against the appellees. To do this would be to have this court pass upon the matter before the trial court has exercised its own initial discretion in the premises. We believe that there is no such final order in the instant suit from which an appeal lies, or of which this court of appellate jurisdiction may properly take cognizance.

In a case in which reservation of final action by the trial court had been made and an appeal taken, it was held, *Gunn v. Black,* 60 Fed. 159, at 160:

> "The order here in question was certainly not a final decree. It was not based upon, and did not embody, any final decision of any of

> the rights of the parties to this suit. It expressly provided that the commissioner after selecting the lands, and executing the deeds of them to the parties, should report his proceedings to the court at the succeeding term. This was an express reservation of final action until the report should be received. The order was a mere direction of the court concerning the method of executing its decree,— an order that would have been entirely within its discretion, if the decree had not been superseded by the appeal. It was not subject to review by appeal in this court."

Stripped of its cloak, we believe it is clear that the ultimate object of what appellants are seeking to accomplish is to compel the trial court to tax the costs of the receivership against the appellees in the suit at this time, notwithstanding the reservation by the trial court of the entire question of taxation of costs until the entry of final decree. The receiver was ordered discharged by the mandate, and immediately on its being filed in the trial court, the property was returned to the officers of the corporation and his report was filed. The receiver had to be paid, and he was paid out of the *large profits* derived during the receivership. As to who should ultimately pay this expenditure was reserved for decision on entry of the final decree. The mandate itself is silent as to any question of taxation of costs, leaving where it properly belonged, all matters pertaining to said question of costs to the sound discretion of the trial court, and after the said trial court's action taxing costs on entry of final decree, if any of the parties should

be dissatisfied, appeal might be taken for review by proper appellate proceedings.

We believe it is a familiar principle of law that the right to exercise a sound discretion is in the trial court and not in the appellate court.

Stokes v. Williams, 226 Fed. 148, 153, 156;
State v. Nebraska Savs. etc. Bank, 60 Neb. 192; 82 N. W. 625;
Chase v. Fisher, 239 Pa. 545; 86 Atl. 1094, 1095.

Had the appellants desired the trial court to exercise its initial discretionary power taxing costs, or to decide who should pay the receiver at this time, and prior to entry of final decree, it seems to us that a mandamus proceeding should have been resorted to, and not appeal.

Re Sanford Fork & Tool Co., 160 U. S. 247; 40 L. Ed. 414, 416;
Texas etc. Ry. Co. v. Anderson, 149 U. S. 237; 37 L. Ed. 717-719.

In view of the foregoing, appellees respectfully submit that their said motion to dismiss should be granted, with costs to appellees.

REAL ISSUES PRESENTED BY THIS APPEAL.

Considered in the light of a possible denial of appellees' motion to dismiss, this appeal becomes singularly anomalous in that the real issues presented and the principles which must control, have been entirely ignored in appellants' opening brief. The

issues presented and the principles discussed in the opening brief have no bearing upon the case and cannot control decision. The decree of this court to which appellants' contentions, if adopted, would necessarily lead, alone should suffice to clearly indicate the fallaciousness and untenability of those contentions. Should appellants' position be approved and adopted by this court, the determination of this appeal could not take the form of a reversal merely of the order appealed from, but of necessity would lead to an affirmative decree tantamount to the exercise of original jurisdiction. In other words, should the appellants prevail upon this appeal, to give the reviewing decision any effectiveness, this court of strictly appellate jurisdiction would have to enter a decree, not only setting aside and vacating the order of the lower court, but affirmatively requiring the lower court to exercise its discretion in respect to one element of the costs in the case in a definite and particular manner. This necessary result of the adoption by this court of appellants' views and positions would in practical outcome convert this appeal into a writ of mandate, without a mandamus proceeding.

That the above conclusions are correct is quite manifest from the concluding paragraph of appellants' brief, as well as from a number of the exceptions specified therein. Appellants' brief concludes thus:

> "Upon the whole, we respectfully pray the reversal of the order appealed from, and the issuance of a decree herein conformable to equity and good conscience."

Appellants' Exception XVIII is as follows:

"Exception XVIII.

That the court erred in ordering and adjudging that the costs and expenses of the receivership be paid out of the funds in the hands of the receiver in the first instance, *and in not also ordering and adjudging that the Presidio Mining Company and/or the defendants have judgment against the complainants for the full amount of the costs and expenses of the receivership.*" (Page 9 Opening Brief.)

The real issue involved in this appeal then may be stated thus: Is this court of strictly appellate jurisdiction authorized in advance of the exercise by the trial court of its conceded initial discretion in respect to the taxation of costs, to direct the lower court to tax the allowed compensation and expenses of the receiver to the complainants?

Preliminary to the discussion of that single issue involved in this appeal it may be well to briefly outline the fact situation out of which the issue arises. Nothing was before the lower court at the time of the making of the order appealed from beyond the approval of the fourth and final account of the receiver and the making of proper allowances to him for compensation and expenses. It is important to keep in mind the fact that appellants make no objection to the accuracy of any of the receiver's reports or to the reasonableness of any of the allowances made to the receiver at the time of such approvals. The objections filed by appellants to the approval of the final account of

the receiver in last analysis amount to the double demand, first, that the fund be not reduced by the payment of the concededly proper and reasonable allowances for receivership compensation and costs, and second, that to accomplish that end the court in advance of the entry of the final decree and the taxation of costs generally, and as a part of its order of approval and allowance, tax all receivership costs to the complainants. The order made by the lower court amounted to a denial of both of these demands. It provided for the payment of the costs and expenses in the *first instance* out of the fund in the receiver's hands, and expressly reserved for incorporation in the final decree the determination of the question as to taxation of costs.

As to the first demand, the lower court very properly took the position that the receiver, as an officer and arm of the court should not and could not be required to undergo the delay, if not the risk, incident to an order requiring him to look to either of the parties for compensation and expenses growing out of the court custody of the property and funds.

As to the second demand, the court very properly held that appellants were not entitled as a matter of right to require that the taxation of receivership costs should be considered and determined independently and in advance of the general taxation of costs which properly constitute a part of the final decree.

It will thus be seen that the real ground of complaint presented by this appeal is the failure of

the court to accede to appellants' demand that the court tax receivership costs in a certain way in advance of the general taxation of costs. Appellees' reply to this principal complaint is, first, that the lower court cannot be compelled by an appeal from its order to make a piecemeal taxation of costs, and second, that an appeal from the order is not an appropriate method of compelling the lower court to exercise its conceded initial discretion in the matter of taxation of costs, and third, that even if the exercise of that discretion could be compelled by an appeal, in no event could the lower court be compelled to exercise its discretion in a certain way.

In appellees' view this appeal must be determined in the light of two very simple and well established principles, namely:

1. Initial discretion in respect to the taxation of costs is vested in the trial court.

2. Prior to the exercise of that initial discretion by the trial court, "first instance" allowance of receivership expenses and compensation out of the receivership fund is warranted and authorized.

The first proposition is so elementary that it is not likely to be questioned by appellants. If in the present situation it is apparent that there has been no exercise by the trial court of its initial discretion in respect to the taxation of receivership costs, it must follow that this appeal is devoid of any element that is properly reviewable by this court. As to the second proposition, appellees insist that a

"first instance" allowance of receivership expenses and compensation out of the fund is not in any sense a taxation of receivership costs, and therefore is not in any sense an exercise by the trial court of its conceded initial discretion in that behalf. This conclusion is reinforced by the express reservation contained in the order of all matters relating to the taxation of costs until the entry of final decree. The allowance from the fund to the receiver is thus expressly made a "first instance" or purely temporary provision for his compensation and expenses. It constitutes a recognition by the lower court of the fact that quite irrespective of which party shall ultimately be required to pay the costs of the case, the fund itself should be charged primarily with the necessary and proper expenses of its administration. That administration was by the court through the receiver, and the expenses of the administration were the expenses and became the debts of the court itself.

The action of the court through the receiver from the inception of the receivership was aimed at the conservation and protection of the property and resulting funds, and the fact that the defendant corporation was benefited by the receivership in an amount in excess of half a million dollars, indicates that the conservatory purpose of that administration was highly successful.

No citation of authorities should be necessary and none will be given in support of the asserted principle that initial discretion in respect to taxation

of costs is with the trial court. The proposition that a "first instance" allowance of receivership expenses and compensation out of the fund with an express reservation of taxation of costs until final decree, is in no sense a taxation of costs, is equally self-evident. The proposition above advanced that such "first instance" allowance out of the fund is warranted and authorized is supported by the following authorities:

As to the relation of the receiver to the parties and the suit, it was held in *Atlantic Trust Co. v. Chapman,* 208 U. S. 370, 371,

> "A receiver is an independent person between parties appointed by the court to receive the rents, issues or profits of lands or other things in question pending the suit, where it does not seem reasonable to the court that either party should do it. He is an officer of the court; his appointment is provisional. He is appointed on behalf of all parties and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause."

To the same effect see *Stuart v. Boulware,* 133 U. S. 82. Similarly in *Union National Bank v. Kansas City,* 136 U. S. 223, at p. 236, it is said:

> "A receiver derives his authority from the act of the court appointing him and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property for that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to

> change the title or even the right of possession of the property."

That the expenses which the court creates in connection with a receivership are burdens necessarily on the property taken possession of, irrespective of the question as to who may be the ultimate owner or who may invoke the receivership is held in

Kneeland v. American Loan Co., 136 U. S. 89, 98;

Atlantic Trust Co. v. Chapman, 208 U. S. 360, 375;

Ferguson v. Dent, 46 Fed. 88, 98.

In *Clark on Receivers,* Volume 1, page 884, it is said:

> "A receiver, being an officer of the court and subject to its control, and not to that of the party asking for his appointment, his fees and expenses are chargeable solely against the fund which comes into his hands as receiver. Costs and administration expenses are to be taxed equitably. (Citing *Palmer v. Texas,* 212 U. S. 118, 132; *Kell v. Trenchard,* 146 Fed. 245; *Elk Fork Oil & Gas Co. v. Jennings,* 90 Fed. 767.)"

In 23 *R. C. L.,* Section 116, at page 106, it is stated:

> "The courts of most jurisdictions are vested with large discretion in determining who shall pay the costs of receivership, and, according to the justice and equity of each case, may assess the costs of the receivership against the fund, against the applicant or apportion them among the parties."

In *Sullivan Lumber Co. v. Black,* 48 So. Rep. 870, a case highly analogous to the present situation, where the order appointing the receiver had been vacated, it was held under the doctrine of the *Atlantic Trust Co.* case heretofore cited, that a receiver derived his authority from the act of the court appointing him, and that the effect was to put the property in the hands of the court, and that compensation should not be denied the receiver because the court improperly exercised the jurisdiction to appoint, and that the court should protect him while acting under the order of the court and may award compensation out of the estate or property entrusted to him for his reasonable services, notwithstanding the order of appointment is subsequently reversed. After reviewing all of the decisions in point the court held that a provisional award of compensation out of the fund was warranted and authorized.

In *State of Texas v. Palmer,* 158 Fed. 705, an interlocutory order appointing a receiver was reversed and vacated and the case remanded for further proceedings not inconsistent with the opinion of the Circuit Court of Appeals and with instructions to discharge the receiver and tax all costs of the receivership against the complainant. On appeal to the Supreme Court of the United States (212 U. S. 132), the order of the Circuit Court of Appeals, to the effect that receivership costs should

be taxed to the complainant, was reversed, the court saying in that connection:

> "In that court the costs of the receivership were assessed against Palmer, the original complainant. The receivership had gone on pending the proceedings upon appeal, and we are of the opinion that justice will be done if the costs of the receivership are paid out of the fund realized in the Federal Court, and it is so ordered, otherwise the judgment of the Circuit Court of Appeals is affirmed."

It was held by Judge Learned Hand in re *Hurlburt Motor Co.,* 275 Fed. 62, in relation to a "first instance" allowance of receiver's compensation and expenses out of the fund, after an adjudication of solvency in a bankruptcy case, that the receiver's compensation and expenses should be paid in the first instance out of the fund to the extent at least of profits realized by the receiver or improvements arising from profits.

See also *Texas & Pacific Ry. Co. v. Manton*, 164 U. S. 636.

FALSE ISSUES ADVANCED BY APPELLANTS.

Appellants' opening brief advances three essentially false issues. It is contended in the first instance that the court was without jurisdiction to appoint a receiver and that therefore such appointment and everything done thereunder was void and wrongful, and that that being true, the fund may not be reduced by the allowances included in the order appealed from and the similar orders which

preceded it. It is next inconsistently asserted that even if the court had jurisdiction to make the order, a recognition of the superior equities would require the taxation of receivership costs against complainants. Again, in the third place, it is insisted that it was obligatory upon the trial court at the time of passing upon the receiver's final report, to exercise its discretion as to the taxation of receivership costs apart from and independently of the exercise of that discretion generally in the case.

The recognized principles controlling the question are elementary. Jurisdiction is power to hear and determine.

In the case of *U. S. v. Arredondo,* 6 Pet. 691, 709, 729, it is held:

> "The power to hear and determine a cause is jurisdiction; it is *'coram judice'* whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition, that on demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; * * *
>
> (p. 729) It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion."

It will be conceded, even by appellants, that the lower court had jurisdiction of the parties and the subject matter of the suit. The essence of appel-

lants' contention as to jurisdiction is that there is a third element essential to jurisdiction, and that before a court can be said to have the power to hear and determine, a *case* must be presented which will, under the principles and rules of equity, authorize the court to act in respect to the subject matter. The cases cited by appellants in support of this contention where they are at all pertinent relate to situations where jurisdiction is limited by statute or by the presence or absence of certain jurisdictional facts. None of these things are present in the instant case and indeed the only limitations under jurisdiction here urged relate to the merits, the showing made and the equities disclosed and the sufficiency of showing and equities to warrant the judicial discretion represented by the decision.

The excess of jurisdiction here complained of is in the appointment of the receiver. It stands admitted that the court had jurisdiction of the parties and of the subject matter of the suit and therefore jurisdiction of the case generally, which general jurisdiction necessarily includes the power to do anything and everything that equity and good conscience require. The appointment of a receiver was not the subject matter of the suit. Indeed such a remedy is never primarily the subject matter of a suit, but is always ancillary to the subject matter. Having jurisdiction of the case generally it follows that the lower court had jurisdiction of the purely ancillary matter of the appointment of a receiver. That jurisdiction necessarily included the

power to hear and determine the application for a receiver, and power to determine the question involved a free judicial discretion. There can be no judicial discretion where the court is not free to determine either way under the facts. The contention of appellants that jurisdiction to appoint a receiver is present only in a case where under the showing made a receiver should be appointed, necessarily leads to the ridiculous conclusion that whenever an appellate court decrees that a receiver should not have been appointed, the court in appointing him must be said to have exceeded its jurisdiction.

It is a matter of some significance that this question of lack of jurisdiction of the lower court to appoint the receiver is raised for the first time in the history of this case upon this appeal. When the former appeal was before this court from the order appointing the receiver, no suggestion was made by appellants that such appointment represented an excess of jurisdiction.

If appellants by plea to the jurisdiction can make it appear that the order appointing the receiver was void, then it would follow that the lower court would have no discretion to exercise in respect to the taxation of the expenses of the receiver's administration, for the reason that the court's custody of the property by and through the receiver was without right or lawful or equitable warrant. It should be apparent that it was the inherent difficulties of the case

from appellants' point of view that is responsible for their resort to this heroic defensive expedient.

It is true that cases might be conceived and doubtless have arisen in which, by reason of statutory restrictions upon the court's jurisdiction to appoint a receiver, such an appointment under certain conditions would be void for lack of jurisdiction. But there is no such statutory or other limitation upon the court's jurisdiction in the instant case to afford any point to either the discussion given to or the authorities cited in support of the contention in that behalf. The receiver was not appointed until the hearing upon the merits was concluded. The appointment of the receiver at that time represented the balanced judgment and discretion of the lower court in view of the equities disclosed. That the matter is not free from doubt notwithstanding the judgment of this court in the former appeal, is indicated by the fact that the dissenting opinion of one member of this court concurred with the judgment of the lower court as to the propriety of the appointment of the receiver under the showing made.

The attitude of appellants upon the former appeal when they stood by their failure to object, admitting and conceding the jurisdiction of the lower court to appoint the receiver, is consistent with their failure at the time the receiver was appointed to make any attempt to render the appointment ineffectual by refusing to surrender the property to the receiver and resorting to the remedy of prohibition to prevent the lower court from enforcing its

order. In a case where the appointment of a receiver is without jurisdiction, prohibition is recognized as the proper remedy to prevent such order becoming effective (*St. Louis Ry. v. Wear,* 36 S. W. 357, 363). It would seem that if excess of jurisdiction in respect to such an appointment is to be urged, good faith would require a resort to that remedy to prevent the accrual of receivership expenses and the deprivation of a defendant of its property and all other damaging results here complained of. In view of the fact that no resort was had to the appropriate remedy of prohibition in this instance, and the fact that the jurisdiction to appoint the receiver was unchallenged upon the former appeal it would appear that the contention now made as to lack of jurisdiction is an afterthought and is resorted to because it is the only means of attacking the evidently proper and authorized order for "first instance" allowance from the fund.

SUPERIOR EQUITIES.

The second false issue advanced by appellants, is that even if the court had jurisdiction to appoint a receiver, a consideration of the superior equities would require the taxation of receivership costs against complainants. This contention proceeds upon the assumption that it was the court's duty upon the incoming of the receiver's final report and in connection with its approval, to finally determine as to which of the parties should be held responsible

for the expenses of the receivership; or in other words, to finally tax that element of the general costs represented by the receiver's expenses and compensation. That such assumption is entirely erroneous will be urged in the discussion of the next succeeding point.

Whatever may be said as to the court's duty then and there to finally tax that particular element of the costs of the case, the order itself indicates that it was not done, but that an examination of that question was reserved and the exercise of the court's initial discretion in that behalf was expressly deferred until taxation of costs should be had generally at the time of final decree. The question not having been passed upon in and by the order appealed from, and the discretion not having been exercised by the lower court, we maintain that all discussion and consideration of the equities, superior or otherwise, in their relation to the taxation of costs generally, or in respect to receivership expenses and compensation, are inappropriate and without any bearing or point upon the determination of this appeal. If the question was not passed upon and the discretion was not exercised, and the principal complaint of appellants is that it *was not* exercised, what possible purpose can be served by a discussion of the equities disclosed upon the hearing calculated to influence the discretion of the trial court in the taxation of costs? And yet appellants have gone to considerable lengths in an attempt to demonstrate that had the court passed upon the

question and had the court exercised its discretion, it should have taxed receivership costs against complainants.

It is respectfully submitted that in view of the fact that the court expressly reserved and deferred all questions as to the taxation of costs until the entry of the final decree, that all consideration and discussion of the matter of equities, superior or otherwise, as bearing upon the question of taxation of costs, become purely academic and moot. Nevertheless, and lest appellees, by failure to respond to the moot observations of counsel on the other side concerning superior equities, shall be considered to assent to the conclusions drawn, appellees are disposed to submit briefly their views of the controlling equities presented in the case, which should make the taxation of receivership costs to the complainants unthinkable.

It should be remembered that this is a stockholders' suit. Two of the minority stockholders, because of the dominance and control of corporate affairs by the majority, have been compelled, for the protection of their own interests and the interests of other minority stockholders and of the corporation, to institute this action to the end that recovery might be had from some of the majority stockholders of valuable property rights. As a result of their activities in that behalf, the interlocutory decree entered in this case required one of the defendants to deed to the corporation a valuable piece of mining ground, known as Section

5, and also cancelled and terminated a lease to the corporation of said section, under which said defendant was entitled to 50 per cent of the profits arising from mining operations upon the section. The three years of receivership administration of the properties of the defendant corporation resulted in the accumulation over and above all expenses of operation, taxes and receivership costs, of upwards of a half a million dollars. A large portion of that half million was derived from Section 5, one-half of which would have gone to defendant Noyes under the lease, but for the termination and cancellation decreed by the lower court. Upon the former appeal from the interlocutory decree of the lower court, the enforced conveyance of Section 5 to the corporation defendant, as also the cancellation and termination of the lease on said section, were expressly affirmed. By that affirmance and the decree of the lower court which is to be entered in accordance with the mandate of this court, the defendant corporation has been enriched by 50 per cent of the proceeds and profits of Section 5, during the three years of the receivership and upon the entry of the final decree will become the owner of Section 5.

In considering the nature and extent of the recovery for the corporation decreed by the lower court and affirmed by this court, as bearing upon the taxation of costs, it should not be forgotten that at all points and stages of the litigation, from the filing of the original answers of the defendants, and

each of them, to the briefs submitted by them upon the former appeal, the defendants, and each of them, consistently, emphatically and even vehemently denied all right and interest of the corporation in or to Section 5, and resisted the award of the section to the corporation and the cancellation and termination of the lease thereon.

The appellants (including W. S. Noyes and the other majority stockholders) allege in their brief that they have sustained great injury and damage by reason of the alleged wrongful appointment of a receiver. Likewise much has been said about so-called superior equities. In considering this phase of the question, however, on this appeal we believe it might be well to disclose the attitude of said appellants in the litigation of which this appeal is a branch, and particularly their position concerning the recovery of Section 5 for the corporation, which they control.

Complainants in Paragraph V of their amended complaint (Orig. Tr. Vol. I, p. 73) state that the defendant corporation from December, 1912, was the equitable owner and entitled to the possession of Section 5, together with the profits made from reducing the ores therefrom and that in law and equity it was entitled to have the title to said Section 5, transferred to it, and that Wm. S. Noyes was not entitled either in law or equity to the title, possession or control of said section; that he was a trustee of said Section 5.

The defendants in answering the averments of the complaint *denied* that said Presidio Mining Company from December, 1912, or at any other time or at all was or is the equitable owner or entitled to the possession of said Section 5 or entitled to any of the profits made from reducing its ores. They *denied* that said defendant corporation was or is entitled *either in law or in equity to have transferred to it the legal title to said Section 5,* and *denied* that defendant W. S. Noyes is not entitled in law or in equity to the title, possession or control thereof; and *denied* that he is or was a trustee of said Presidio Mining Company, or any other person (Orig. Tr. Vol. I, p. 133).

W. S. Noyes in a separate answer, (Orig. Tr. Vol. I, p. 198) makes the same denials, and both answers pray that complainants take nothing by their amended bill of complaint (Orig. Tr. Vol. I, pp. 154, 218). Complainants' amended prayer referred to by appellants in their brief, prays that recovery be had by and for *defendant Presidio Mining Company* (Orig. Tr. Vol. I, pp. 285-290).

In the assignments of error (Orig. Tr. Vol. IV, p. 1128), the defendants assign as error, that the court erred in finding and decreeing that the Presidio Mining Company at all times has been and now is the lawful and equitable owner of Section 5; and also assign as error (Vol. IV, p. 1130) an order of the trial court that by the final decree the said Wm. S. Noyes *shall be ordered and directed within thirty days from the date thereof to transfer*

said Section 5 to the Presidio Mining Company by proper deed, etc.

It will thus be seen that not only did the individual appellants, as majority stockholders, compel the defendant corporation to resist the recovery of Section 5 against its own benefit, but on the contrary, actively supported the contention of the defendant W. S. Noyes that he alone was entitled to the said section and its profits.

The record likewise discloses that said appellants in their answers below admitted that they knew of the Osborn embezzlements and shortages (which aggregated approximately $15,000) and acquiesced in the retention of him as secretary at a salary of $300 per month and concealed said embezzlements from the minority stockholders (Original Tr. Vol. I, pp. 249, 271). These are significant admissions and it is apparent

(a) That the corporation was compelled against its own interests to deny any right to Section 5 because of the majority control held by the individual appellants. We believe it is a familiar principle of law that the position thus assumed by the appellants in their pleadings effectually estops the corporation from claiming any right of conveyance to itself of Section 5. *Sullivan v. Colby,* 71 Fed. 460; *Davis v. Wakelee,* 156 U. S. 680-692.

Through this litigation however the resisted transfer of Section 5 from W. S. Noyes has been decreed to defendant Presidio Mining Company.

(b) That by agreement of the individual appellants, as evidenced by their verified answers, they withheld and concealed from the minority stockholders the fact that one of its officers had embezzled large sums of money from the corporation, and retained said embezzling director-secretary in a position of trust and used his vote, warranting a fair inference that they were not acting in the best interests of the corporation, thereby giving to the lower court the right to substitute its own agent as a receiver to take charge of the corporate affairs pending final decree.

The record in this case conclusively estops the defendants, and each of them, from asserting or contending that the corporation has not been greatly enriched and benefited by the outcome of the suit, or from denying that they have done everything possible to prevent the recovery awarded. It is presumptious, in the face of this record and of the defendants' consistent attitude in opposition to the relief awarded to the corporation, not only by the lower court, but by this court, to talk about the superior equities warranting and compelling the taxation of the costs of the case to the complainant stockholders, through whose energy and advances the substantial recovery for the corporation has been realized. However, so far as this appeal is concerned from an order in which all taxation of costs was expressly reserved and deferred until final decree, and in which receivership costs were not taxed at all, but only temporarily provided for

out of the fund, the discussion of the considerations which should control the discretion of the court in the final taxation of costs is altogether superfluous.

When the proper time arrives for considering the question of the taxation of the receivership costs, the impropriety of taxing them to the complainants will be urged, not only upon the ground that as a result of the suit the corporation defendant has been largely benefited by the recovery realized, but on the ground that a large portion of the expenses of the receivership was expressly by stipulation concurred in by the appellants themselves. All of the amounts paid as indicated by the four reports of the receiver to F. C. Handy, representative of the receiver at the mine, as well as those paid to the receiver's bookkeeper, were consented to by appellants (see New Tr. Vol. II, pp. 493-500). These amounts aggregate $21,613.33.

The former appeal did not supersede the proceedings in the case and the allowance to the Master in Chancery for the accounting made upon the court's order during the pendency of the appeal is another element that is constructively assented to by reason of appellants' failure to stay proceedings pending appeal. The amount of the Master's allowance was $2500. As to the allowance on account of services of Haskins & Sells, certified public accountants, amounting to $3679.40, it appears from the court's order authorizing their employment that "all of the parties consented thereto" (see New

Tr. Vol. I, p. 181). The aggregate of the various amounts consented to by appellants is $27,792.73.

It will also be seen by an examination of the record that $42,620.33 interest was derived from invested funds placed by the receiver during his receivership and disclosed in his reports as follows:

New Tr. Vol. I, p. 270—February 23, 1918, to Oct. 31, 1918	$ 1,931.61
New Tr. Vol. I, p. 279—November 1, 1918, to Oct. 31, 1919	9,725.39
New Tr. Vol. I, p. 302—November 1, 1919, to Oct. 31, 1920	17,354.15
New Tr. Vol. I, p. 331—November 1, 1920, to May 1, 1921	13,609.18
Total	$42,620.33

In addition to the foregoing facts, there is also the saving of salaries, which were not paid, to the company officers during the receivership, including the saving after December 1, 1918, of the salary of E. M. Gleim, superintendent, who was removed by the receiver on or about said date.

TAXATION OF RECEIVERSHIP COSTS ON FILING FINAL REPORT NOT MANDATORY.

As to the third false issue:

Appellants insist that it was obligatory upon the trial court at the time of passing upon the receiver's final report to exercise its discretion as

to the taxation of receivership costs apart from and independently of the exercise of that discretion generally in the case. If the contention be sound and it was the clear duty of the trial court upon the approval of the receiver's report and the allowance of his compensation and expenses, to then and there tax the same as costs to the complainants and not reserve and defer action in that behalf until the taxation of costs generally, then the lower court failed and refused to perform what was under the law a judicial function. In that event mandamus is clearly indicated as the appropriate remedy to compel the court to perform its duty and exercise its legal function. The court did not act as indicated by its express reservation of the matter until final decree, but refused at that time to act in respect to the taxation of receivership costs, and while a writ of mandamus might have enforced such action, if the mandatory predicate be conceded, it is inconceivable how this appeal can be made to serve the same purpose. Appellants complain in this regard, not as to something which the court by its order did, but as to something which the court refused to do. No authorized determination of this matter on appeal can correct the refusal complained of. Appellants evidently sense the incongruity of the situation when they invoke in the concluding paragraph of their brief the issuance of some extraordinary affirmative remedy, which though nameless, shall nevertheless be "conformable to equity and good conscience".

As above stated, it is inconceivable that this court of exclusive appellate jurisdiction should by its decree herein direct the lower court not only to exercise its concededly initial discretion in respect to the taxation of costs piece-meal, and as to the receivership costs, in advance of the taxation of costs generally, but as well require the lower court to exercise its initial discretion in a certain way.

CONCLUSION.

In this suit we have the situation presented of a corporation in the control of L. Osborn and four dummy directors, in December 1912 (New Tr. p. 44). With the exception of the appellants Peat and Osborn, this dummy board was superseded in January, 1913, by appellants Noyes brothers and L. M. Doherty, the reason for the change being shown in the affidavits of W. S. and B. S. Noyes, dated December 16, 1915 (New Tr. pp. 43, 44, 61). This board of directors, the appellants herein, as a majority control of said defendant corporation, concealed the embezzlements of corporate funds by director-secretary Osborn, from the minority stockholders; and continued him in office at his salary of $300 per month. These facts are admitted in the answers of said appellants (Old Tr. Vol. I, pp. 249, 271). In July, 1915, when this suit was filed the corporation was $80,000 in debt (Orig. Tr. Vol. I, p. 187). The corporation has paid no dividends since 1905. When the receiver was discharged

on May 7, 1921, he returned to the corporation $638,000 in cash, sound securities, and bullion in transit. Of this amount over $500,000 represented net profits accruing from the receiver's management of the corporation during three years two and one-half months, and a large part of which sum came from Section 5, which by the decree has been taken from W. S. Noyes and given to the company, against the resistance of all said individual majority defendants.

These appellants now urge, that the appellees who discovered the embezzlements, stopped the financial leaks in the corporate affairs, recovered Section 5 with its large profits during the receivership, for defendant Presidio Mining Company, controlled as aforesaid by appellants, should be mulcted in all receivership costs incident to the realization of the benefits to said defendant corporation resulting from this litigation, urging as grounds therefor, that such procedure would be fair and equitable in the premises.

On the other hand we have the position of the appellees supported by the other minority stockholders as evidenced by their petition to intervene in this suit, filed in this court February 9, 1920, regularly argued and submitted, with no decision thereon by this court.

But all such considerations are beside the mark here, and become appropriate matters for consideration only upon the exercise of the lower

court's discretion in the matter of the taxation of costs.

In appellee's view this appeal should be dismissed, and if not dismissed, the order of the lower court should be affirmed for the following reasons:

First. That this appeal is manifestly premature in that the lower court has not as yet acted in any way in respect to the taxation of costs; the "first instance" allowance from the fund being a mere temporary provision for the court's costs out of the profits of the court's receivership administration.

Second. That should the ultimate taxation of receivership costs be unsatisfactory to appellants they have a clear remedy by appeal from the final decree, in which such taxation will be incorporated.

Third. That prior to the exercise by the lower court of its initial discretion as to the taxation of receivership costs, there is no occasion, and, indeed, no authority for this court to consider or determine the superior equities which should control a judicial discretion in the taxation of the costs in question.

Dated, San Francisco,
October 21, 1922.

Respectfully submitted,

WILLIAM DENMAN,
WM. F. ROSE,
Solicitors for Appellees.

HORATIO ALLING,
Of Counsel.